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Supreme Court, U.S.
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No. 86-2041

In The

Supreme Court of the United States

October Term, 1987

—o—

EFFIE BELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

—o—

MOTION OF APPELLEE FORD MOTOR COMPANY TO DISMISS OR AFFIRM

—o—

GARY E. SOUTHWORTH
SOUTHWORTH & MCGILL, P.A.
202 West Jackson Street
P. O. Drawer 13046
Pensacola, Florida 32501
(904) 432-6000

Attorneys for Appellee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

The Appellee, FORD MOTOR COMPANY, (hereinafter referred to as "FORD") disagrees with the framing of the question presented by the Appellant, EFFIE DELL CASSIDY, ET AL (hereinafter "CASSIDY"). FORD submits that the questions actually presented in this cause are as follows:

1. Whether or not the Appellant has presented any federal question for review by this court;

2. Even if a federal question has been presented by the Appellant, whether a substantial federal question is involved in this cause.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF APPELLEE FORD MOTOR COMPANY TO DISMISS OR AFFIRM

Appellee, FORD MOTOR COMPANY (hereinafter FORD) moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the court of the District Court of Appeal, First District, State of Florida on the grounds that it is manifest either that no federal

question exists to be reviewed by this court or that the federal question involved is not substantial.

STATUTORY PROVISION INVOLVED

The Appellant CASSIDY attempts to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257 (2). Although the basis for jurisdiction is not set out in the Jurisdictional Statement, Appellant presumably relies upon that portion of 28 U.S.C. Section 1257(2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

STATEMENT OF THE CASE

In 1975, the Florida Legislature enacted Section 95.03 (2), Florida Statutes (1975), which provided that actions for product liability must be begun within twelve (12) years after the date of delivery of the completed product to its original purchaser regardless of the date the defect in the product was or should have been discovered.

In 1980 the Florida Supreme Court in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980)

declared the twelve year statute of repose contained in Section 95.03(2), Florida Statutes (1975) to be unconstitutional as violating the access to courts provision of Article I, Section 21, of the Florida Constitution.

In 1985 the Florida Supreme Court reconsidered its decision in *Battilla* in a case styled *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985). In its opinion the Supreme Court noted that

> The trial court granted summary judgment against Pullum on the basis that his action was barred by Section 95.031(2) Florida Statutes (1979).

Continuing along in the *Pullum* decision the Florida Supreme Court stated:

> We have reconsidered our decision in *Battilla* wherein we expressly held:
>
> > The circuit court held that this product liability action was barred by the statute of limitations, Section 95.031, Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Simmons*, 369 So.2d 572 (Fla. 1979), and hold that, as applied to this case, Section 95.031 denies access to courts under Article I, Section 21, Florida Constitution. (Citations omitted.)
>
> 392 So.2d at 874. We recede from this decision and hold that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. The legislature, in enacting this statute of repose reasonably decided that perpetual liability places an undue burden on manufacturers, and it decited that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

Based upon the *Pullum* decision, Firestone, Budd and Ford each filed Motions of Summary Judgment in the trial court, which motions were granted.

The Appellant here, CASSIDY, appealed the summary judgment granted in the trial court to the District Court of Appeal, First District, State of Florida which affirmed the judgment for Appellees rendered in the trial court below. Subsequently, the Florida Supreme Court denied the Appellants Petition for Review.

The accident involving Appellant, KENNETH CASSIDY, occurred on February 6, 1982. KENNETH CASSIDY was injured by the separation of a multi-piece rim wheel which all parties have agreed was delivered to the original purchaser more than twelve (12) years prior to KENNETH CASSIDY'S injury.

———o———

ARGUMENT

I.

THE APPELLANT HAS NOT PRESENTED ANY FEDERAL QUESTION FOR REVIEW.

The basic issue in this case is whether or not the CASSIDYS' cause of action was barred by the clear wording of Section 95.031(2), Florida Statutes (1975) which provides in part:

> (2) Actions for products liability and fraud under s.95.11(3) must be begun within the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of

> running from any date prescribed elsewhere in s.95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The facts are clear and admitted by all parties that KENNETH CASSIDY was injured by the separation of a multi-pieced rim wheel which was delivered to the original purchaser more than twelve (12) years prior to his injury. Clearly if Section 95.031(2), Florida Statutes (1975) is applicable to this case then CASSIDYS' action was barred at the time the injury occurred. The only reason that the Appellants were able to file suit in the instant case was a ruling by the Florida Supreme Court in *Battilla v. Allis Chalmers Manufacturing Company,* 392 So.2d 874, (Fla. 1980) which held that as applied to the facts in the *Battilla* case, Section 95.031(2) denied access to the courts under Article I, Section 21 of the Florida Constitution. The effect of the *Battilla* decision was to hold in abeyance the provisions of Section 95.031(2), Florida Statutes (1975), effectively removing the twelve (12) year period after which product liability suits could not be brought. Significantly, Florida Statutes Section 95.031(2) was neither repealed nor modified by the Florida Legislature but was subsequently re-enacted even in the face of the *Battilla* decision. Therefore, but for the effect of the *Battilla* decision holding the statute of repose in abeyance, KENNETH CASSIDY would not have been able to file his suit as he did in 1982 in that it would have been barred by the twelve year statute of repose.

In 1985 the Florida Supreme Court reconsidered the decision in *Battilla* in the case styled *Pullum v. Cincinnati, Inc., supra.* The Florida Supreme Court stated that they had reconsidered their decision in *Battilla* where they had expressly held that Section 95.031 denied access to the courts under Article I, Section 21 of the Florida Constitution. The court in *Pullum,* supra then went on to say:

> We recede from this decision and hold that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

The effect of the *Pullum* decision was to reinstate the the twelve year statute of repose for product liability actions contained in Section 95.031(2) Florida Statutes (1975). Subsequent to the publication of the *Pullum* decision the Appellees filed a Motion for Summary Judgment in the trial court on the basis that the instant claim was barred by the twelve year statute of repose as set out in Section 95.031(2) Florida Statutes. The trial court granted the Motions for Summary Judgment.

For purposes of Appellant's Jurisdictional Statement it is important to recognize that the decision in *Battilla, supra* which held Section 95.031(2) Florida Statutes (1975) to be unconstitutional was based solely upon provisions contained under Article I, Section 21 of the Florida Constitution. No federal constitutional basis was asserted.

When *Battilla* was reconsidered by the Florida Supreme Court in *Pullum, supra* the decision was clearly

based on the opinion of the Supreme Court of Florida that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. Again, no reference is made to nor is any decision of the Florida Supreme Court based upon the Constitution of the United States. Admittedly, the Florida Supreme Court has changed its opinion as to whether or not the twelve (12) year statute of repose violates provisions of the Florida Constitution, but this is a decision which the highest Court of a state can and must make in the interpretation of that State's Constitution.

Although it is difficult to ascertain precisely how the Appellants feel that they have raised a federal question in their jurisdictional statement it is apparent throughout that they have not challenged the constitutionality of Section 95.031(2) Florida Statutes (1975) either pursuant to the Florida Constitution or the Constitution of the United States. Instead, the jurisdictional statement appears to proceed on the theory that since they had been allowed to file a lawsuit due to the application of *Battilla*, they should be allowed to proceed with the case to conclusion regardless of any reconsideration of the wisdom or lack of wisdom of the *Battilla* decision. This ignores the inescapable fact that but for the decision in *Battilla* which prevented the operation of Section 95.031(2) Florida Statutes from barring KENNETH CASSIDY'S action at the time of occurrence, there would have been no basis for CASSIDY'S claim as it would have been time barred. Arguing that KENNETH CASSIDY had the right to rely on *Battilla* and that this became a vested right which could not be taken away by the subsequent reinstatement or reactivation of Section 95.031(2) Florida Statutes by the de-

cision in *Pullum*, is an attempt by CASSIDY both to have his cake and eat it too. In short, CASSIDY wants to be able to take advantage of and rely upon the Florida Supreme Court's decision in *Battilla* so that he could file suit, but he does not wish to accept the consequences of the subsequent decision of the Florida Supreme Court in *Pullum* which would allow the provisions of Section 95.031(2) Florida Statutes to bar his cause of action at the time that the accident occurred.

A review of the opinion of the First District Court of Appeal, State of Florida, which is attached to the appendix of the Appellant's jurisdictional statement makes clear that the decision in the instant case has been based solely upon Florida law. Nothing in the decision indicates that the First District considered or resolved in any fashion CASSIDY'S claim under the Fourteenth Amendment to the United States Constitution. This is significant in that when the highest court of the state from which review may be obtained fails to pass on a federal question it is presumed that the omission is due to a lack of proper presentation of the Constitutional issue. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.63 (1983). Although this presumption can be rebutted in proper cases, the Appellant has made no such showing in his jurisdictional statement.

Consequently, in view of the fact that the Appellant failed to challenge the applicable Florida Statute, both at the trial level and at the appellate level, there exists no federal question to be reviewed by this Honorable Court.

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ARGUMENT

II.

EVEN IF A FEDERAL QUESTION HAS BEEN PRESENTED BY THE APPELLANT, NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CAUSE.

The issue of law raised in the Appellant's jurisdictional brief presents no substantial federal question for consideration by this court. Appellant asserts that the retroactive application of the Florida Supreme Court decision in *Pullum v. Cincinnati, Inc.* somehow destroyed CASSIDY'S property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. However, any such argument would seem to turn upon the validity of the decision of the Florida Supreme Court in *Pullum v. Cincinnati, Inc.* This court has already dismissed an appeal in the *Pullum v. Cincinnati, Inc.* case finding no substantial federal question. 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986). It is respectfully submitted that there is no way to distinguish the instant case from that of *Pullum v. Cincinnati, Inc.*, and that there is no substantial federal question contained in the instant case which would differ significantly from *Pullum v. Cincinnati, Inc.*

A further reason why any federal question contained in this case is not substantial can be found at page four of the Appellant's jurisdictional statement in which he notes that in 1986 the Florida State Legislature repealed the twelve (12) year statute of repose. Therefore, any questions resolved by *Pullum* will not be involved in future cases.

As a result of the above it is apparent that even if there is a federal question involved the question is not substantial and is limited to the facts presented in the underlying opinion.

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CONCLUSION

For the foregoing reasons the Appellee's Motion to Dismiss the appeal herein or in the alternative to affirm the judgment of the First District Court of Appeal of the State of Florida should be granted.

Respectfully submitted,

GARY E. SOUTHWORTH
SOUTHWORTH & MCGILL, P.A.
202 West Jackson Street
P. O. Drawer 13046
Pensacola, Florida 32501
(904) 432-6000

Attorneys for Appellee